Petition

81-551

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALPHONSE ZAMBUTO,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Were the Fourth Amendment rights of the owner of a private home violated by the warrantless arrest in his home of a person, concerning whom there was no probable cause to believe was armed, was in possession of contraband, nor had committed a crime of violence nor was being chased in hot pursuit and therefore, there being an absence of exigent circumstances?

2. What exigent circumstances will justify a warrantless arrest of a guest without violating the Fourth Amendment Constitutional rights of the owner of a private home?

3. Where a guest in a home is arrested without a warrant, are the Constitutional rights of the owner thereof violated by an attendant tour through the rooms for examination or must the law enforcement officers promptly remove their prisoner?

4. Where an unreasonable search of a home uncovers contraband, can it be said that a consent to search for additional contraband was voluntary within Fourth Amendment standards?

5. Should a witness at a suppression hearing, who is in jeopardy of indictment by virtue of a search, be given immunity for testimony given at the suppression hearing?

Petitioner respectfully petitions for a writ of certiorari to review the order entered the 22nd day of May, 1981, of the United States Court of Appeals for the Second Circuit, petition for rehearing and for suggestions for rehearing in banc having been denied by order entered the 29th day of July, 1981, affirming the judgment of conviction entered on the 4th day of February, 1981 in the United States District Court for the Southern District of New York (Ward, J.), sentencing him to a term of seven years in-

carceration and three years special parole on his conviction on his plea of guilty to counts one and fourteen of the superceding indictment, charging him with conspiracy in violation of 21 U.S.C. 846 and possession of a controlled substance, in violation of 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(A). At a pre-trial hearing, the District Court denied petitioner's motion to suppress the evidence against him, seized from his home, during a warrantless search made in the course of an arrest of a third person, who had entered petitioner's home, under circumstances that would lead the surveilling officers to reasonably believe he would not remain for a long period of time.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALPHONSE ZAMBUTO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION AND ORDER BELOW

The order of affirmance of the United States Court of Appeals for the Second Circuit dated May 22nd, 1981, has been officially reported, *sub nom, United States v. Todisco,* ____F.2d____ (2nd Circ., 1981, slip opinion nos. 1380-1, 1385-6, 1391-2, 1395). The order of the 29th day of July, 1981, denying rehearing and suggestion for rehearing *en banc* was denied without opinion and is not officially reported. The decision of the District Court denying the motion to suppress was made on the record, without formal opinion.

JURISDICTION

The jurisdiction of the Supreme Court is invoked to review the order of affirmance of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1254.

STATEMENT OF THE CASE

The superceding indictment charged a broad conspiracy, headed by codefendant Anthony Todisco and including defendants Salvatore Sperrazza, John Campopiano, Anthony Vallone, Leonard Barracano, David D'Angelo, Hector Torres, Luis Acosta and petitioner, to violate the narcotics laws of the United States by distribution of a controlled substance, to wit, heroin.

The codefendant Todisco came under suspicion as the supplier for codefendants Hector Torres and Luis Acosta, who over a period of several months negotiated large scale sales to a Special Agent of the Drug Enforcement Administration, acting in an undercover capacity. The first sale took place on the 26th day of June, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, when codefendants Acosta and Torres sold approximately 117.64 grams, net weight, of heroin to an undercover agent. Shortly thereafter, codefendant Anthony Vallone met codefendant Torres in the vicinity of the sale, while under surveillance.

The next transaction took place on the 1st day of August, 1980. Codefendants Todisco and Vallone were observed meeting with codefendant David D'Angelo in a parking lot in the vicinity of 149th Street and the Cross Island Parkway in Queens County, New York. A second meeting took place at the same location between codefendants Vallone and D'Angelo. Codefendant Vallone then

drove to the Bronx. In the vicinity of 30 East Kingsbridge Road again, codefendants Acosta and Torres sold approximately 118.85 grams, net weight, of heroin to the same undercover agent for $43,500. Shortly thereafter, codefendant Torres met with codefendant Vallone in the vicinity of the sale. Vallone then drove to 149-54 21st Avenue in Queens County, the home of codefendant Todisco.

Thereafter, an order was obtained for electronic surveillance of the telephone listed in the name of Todisco at 149-54 21st Avenue, in the County of Queens, for the purpose of overhearing the communications of Todisco, Vallone, Torres and D'Angelo. It was during the course of this electronic surveillance that telephone conversations between Todisco and codefendant Salvatore Sferrazza were intercepted, from which it might be inferred that Sferrazza was supplying Todisco with some of the heroin being distributed by the latter.

On August 14th, 1980, Acosta and Torres, again in the vicinity of 30 East Kingsbridge Road, in Bronx County, made another sale to the undercover agent, this time 118.71 grams of heroin for $43,500.

Having identified what was believed to be all members of the conspiracy through undercover sales, physical surveillance and electronic surveillance, it was arranged that on September 3rd, 1980, a large scale purchase would be made from Torres and Acosta, to be delivered by them in installments throughout the day. The plan was to arrest all of the known members of the conspiracy after the first delivery. It must be stressed that at that time, the identity of petitioner Alphonse Zambuto was unknown to the agents. He had never been observed with any of the conspirators and his voice had never been electronically intercepted.

On the 3rd day of September, 1980, the date fixed for the arrest, Todisco and Vallone were followed. Vallone was

observed making a delivery to Torres in the vicinity of 30 East Kingsbridge Road and shortly thereafter, Torres and Acosta sold one half kilo of heroin to the undercover officer for $137,500. Torres put the money into a case which was turned over to Vallone, who then returned to the center of Todisco's operations at 610 Waring Avenue.

That morning Sferrazza was followed from his home to 21-02 21st Road, in Queens, an address that up to then, had no significance in the investigation. It was a private house, belonging to petitioner Zambuto. The agent who followed Sferrazza, remained on surveillance outside the 21st Road premises. He observed Sferrazza enter it, and he observed Todisco, carrying a brown paper bag, also go into the house. Ten minutes later, Todisco came out carrying a different paper bag. Forty five minutes later, Sferrazza came out. Special Agents followed Sferrazza, but lost him in traffic and therefore returned to continue their surveillance on the 21st Road house.

The Special Agent in charge of surveillance outside the 21st Road property received a message on his two way radio that Todisco, Vallone, Torres and Acosta had been arrested in Bronx County. Ten minutes later, Sferrazza arrived back at 21st Road and went into the house.

Special Agents then followed Sferrazza into the house, where they encountered petitioner's wife, Lucrezia Zambuto and his two children. Petitioner was not present. The agents then made a general examination of the house, going from room to room, claiming to have done this to secure the premises against weapons or other danger. In the basement, they observed what appeared to be a heroin cutting mill, consisting of baggies and white powder, which field tested to be heroin.

Sferrazza and Mrs. Zambuto were then prevailed upon to take the agents to a hiding place where they found $300,000, $137,500 of which was allegedly the money that

the undercover agent had given to Torres and Acosta earlier in the day, and which it is the Government's theory, made its way from Vallone to Todisco and to the Zambuto home.

Neither Mrs. Lucrezia Zambuto, the wife of petitioner, nor his teenage children, were arrested, despite the fact they were present at the time of the raid. On the other hand, petitioner was later arrested, despite the fact that his name never came up in the investigation until the warrantless raid was made upon his home on the 3rd day of September, 1980 and he had not even been at home at the time.

A hearing took place in District Court to suppress the evidence seized from the Zambuto home on the 3rd day of September, 1980, as well as evidence seized the same day from Todisco's headquarters and information derived from wiretapping. District Court Judge Ward denied the motions in all respects and it was agreed that all defendants, including petitioner, would be permitted to appeal the denial of the motion to suppress and to remain free on bail, pending appellate review. Relying upon that agreement, petitioner entered a plea of guilty to conspiracy and one count of possession of narcotics with intent to distribute same. However, the United States Court of Appeals affirmed the convictions of all defendants, including petitioner, in a reported opinion, writing concerning petitioner:

> " . . . We hold that, even assuming that a warrant was required to arrest Sferrazza in Zambuto's home absent exigent circumstances, *Steagold v. United States*, 49 U.S.L.W. 4418 (U.S.) the arrest here nevertheless was proper. In that regard, we hold that Judge Ward's findings of fact, stated on the record on December 4, 1980, that exigent circumstances justifying the arrest clearly existed . . . . "

Petitioner was thereafter remanded.

On the 29th day of July, 1981, the United States Court of Appeals denied petitioner's motion for rehearing and suggestion for a rehearing in banc.

A. PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTH AMENDMENT WERE VIOLATED BY A WARRANTLESS ARREST OF A THIRD PERSON, CONCERNING WHOM THERE WAS NO PROBABLE CAUSE TO BELIEVE WAS ARMED NOR IN POSSESSION OF CONTRABAND NOR THAT HE HAD COMMITTED A CRIME OF VIOLENCE. NOR WAS HE BEING CHASED IN HOT PURSUIT, TO CONSTITUTE EXIGENT CIRCUMSTANCES.

The Government claimed that there were exigent circumstances justifying the warrantless intrusion into petitioner's home to arrest Sferrazza, to wit, some vague fear that were Sferrazza to learn that the others had been arrested in Bronx County, he would, himself, become a fugitive. It is submitted that such speculative apprehensiveness by law enforcement officers does not constitute "exigent circumstances" in a Constitutional sense, to justify the forced entry into a home to make an arrest of a guest therein, and the finding of the Second Circuit to that effect was serious constitutional error.

The starting point in the case at bar would seem to be *Payton v. New York*, 445 U.S. 573 (1980), with its requirement that an arrest warrant must be secured to justify the entrance into the home of a person to be arrested. In *Steagald v. United States*, 49 U.S.L.W. 4418 (U.S. April 21, 1981), this Court seemed to interpret *Payton* as requiring both an arrest warrant and a search warrant in order to authorize the arrest of a guest in the owner's home and to

make an attendant search. In *Steagald*, the arresting officers were armed with an arrest warrant, but not a search warrant. The Court held that the owner of the house had standing to have any evidence seized in the course of the arrest suppressed, absent authority of a search warrant, as well. It would therefore follow that petitioner would have the same standing for suppression, where the officers were not even armed with an arrest warrant.

In *United States v. Lindsay*, 506 F.2d 166 (D.C.), the Court held that exigent circumstances to justify a warrantless entry into an area of protected privacy would encompass hot pursuit, the commission of a grave offense—particularly one of violence, reason to believe the fugitive to be armed, and likelihood that the fugitive would escape. None of these facators existed in the case at bar. Certainly, it cannot be said that the agents were in hot pursuit of Sferrazza. The record reflects that they had him under observation for many hours that morning, observing and following, without any effort to put him under arrest. Indeed, a factor militating against the hot pursuit justification is all of the opportunities there were to arrest him outside of the Zambuto home, which had been passed over by the surveilling officers. There was a minimal amount of probable cause to believe that Sferrazza had been involved with Todisco, derived from the wiretapping, but certainly no evidence that he had committed a crime of violence. That heavy quantity distribution of narcotics is a serious crime, is beyond dispute. However, it cannot be that this court intended that *Payton* be watered down to exclude from its command, arrests for serious crimes. Indeed, *Payton* himself was arrested for murder, and yet this Court held that an arrest had been required by the Fourth Amendment. Fear that Sferrazza would escape did not justify an entrance into the Zambuto home without a war-

rant to arrest him. Balancing petitioner's right of privacy against the need to effect the arrest of a felon, the needs of the Government could have been easily attained by surrounding the house and putting it under surveillance to await the exit of Sferrazza.

In *Warden v. Hayden*, 387 U.S. 294 (1968), the Supreme Court held that the mere commission of a serious crime was not sufficient to justify an entry into a private home to make the arrest, but only where there was hot pursuit of the fugitive. To water down the protections of *Payton*, could only work to prematurely nullify the pronouncement of this Court. Compare, *United States v. Jarvis*, 560 F.2d 494 (2nd Circ., 1977); *United States v. Campbell*, 581 F.2d 22 (2nd Circ., 1979).

Given that the circumstances relied upon by the Special Agents to enter the Zambuto home to arrest the unsuspecting Sferrazza, a man in his late fifties hardly likely to put up a struggle, did not rise to the level of exigent circumstances, it becomes abundantly clear that the purpose of the agents in seeking an excuse to enter the Zambuto home, was for opportunity to make a search therein, their suspicions having been aroused by the entry and departure that morning of the prime suspect, Todisco, carrying one bag when he entered and another when he left. However, this observation would hardly have been sufficient to secure a search warrant. It cannot be that law enforcement officers may search through the privacy of a home on less probable cause than it would require to obtain a warrant. *Whitley v. Warden*, Wyoming State Penitentiary, 401 U.S. 560 (1971). "Any idea that a search can be justified by what it turns up was long ago rejected in our constitutional jurisprudence." *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Finally, it should be noted that the officers went beyond any permissible license carved from exigent cir-

cumstances, without conceding their existence. Instead of taking their prisoner, Salvatore Sferrazza and removing him and themselves from the Zambuto household, without any unnecessary intrusion upon the privacy of these people, the officers set out to make a security check of the house, by going from room to room, until they arrived at the downstairs basement. It was there that they found contraband in plain view, to wit, baggies for packing and a white powder that tested out to be heroin. Indeed, *Chemel v. California*, 395 U.S. 752 (1969) constitutes a mandate to require law enforcement officers to minimize their intrusion in the course of a search. It would seem that where an entry is made into a home to arrest a mere guest, such limitation should be particularly circumscribed, and the room to room search in the case at bar went beyond any claimed license by the officers herein.

B. THE TOTALITY OF CIRCUMSTANCES MILITATED AGAINST ANY VOLUNTARY CONSENT BY PETITIONER'S WIFE TO SEARCH THE PREMISES

The money seized in the basement of the Zambuto home was material to the Government's case. It was a key link to the transaction on Kingsbridge Road, since the agents claimed that the money retrieved in the Zambuto home was the money paid by the undercover agent to Torres and Acosta.

It was the contention of the Government, upheld by the Circuit Court, that petitioner's wife consented to the search for the money in the basement. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a

claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543 (1968); *United States v. Ruiz-Estrella*, 481 F.2d 723 (2nd Circ., 1973).

What militates against a voluntary consent is that prior to the claim it was made, the agents had roamed through the house at will, finding contraband in the basement. This exploratory search was undertaken, surely without an exigency, since the agents if they felt uneasy, could have promptly removed their prisoner. Thus, the tour of the house was certainly undertaken without any exigency. *United States v. Chadwick*, 433 U.S. 1 (1977). It cannot be said that Ms. Zambuto voluntarily disclosed the hiding place of the money, when the illegal search of the basement already let the cat out of the bag, and therefore acted as a coercive device to compel her disclosure. It cannot be that Government agents can rely upon consent to justify the last leg of a search, after they undertook a prior exploratory search on their own whim. The discovery in the basement acted as a coercive device to induce her to curry favor, lest she be arrested by virtue of what they already found. It is the prior intrusion that militates against any claim of consent.

The record is abundantly clear that Ms. Zambuto was never warned of her right to refuse to consent. "While knowledge of the right to refuse to consent is one factor to be taken into account, the Government need not establish such knowledge as the *sine qua non* of an effective consent." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Knowledge of the right not to consent is "highly relevant to the determination that there had been consent." *United States v. Mendenhall*, 100 S.Ct. 1870 (1980).

Other circumstances militating against consent was that the agents, one dozen strong, entered the Zambuto home with guns drawn and remained in an inordinate

length of time. Ms. Zambuto, an Italian immigrant, not well versed in English, was easy prey to such pressure.

Finally, the Court below found Ms. Zambuto's testimony at the hearing to be incredible because of her availing herself of her privilege against self-incrimination on cross-examination by the United States Attorney. Ms. Zambuto testified, without representation. She was never advised by the Court that the police of this Court has long been to afford a defendant protection from the use of suppression hearing testimony against him, in order to encourage full exercise of Constitutional rights. *Simmons v. United States,* 390 U.S. 377 (1978). It would seem that Ms. Zambuto was one step from being a defendant in this case, and therefore, the Court should have alerted her to the protection of *Simmons.* Whether the usual witness at a suppression hearing is entitled to the protection of *Simmons,* need not be reached in the case at bar. However, it would seem that one in the shoes of Ms. Zambuto who had a genuine apprehension that her name might well be added to the indictment, should have been alerted to the protection of Simmons and been afforded same. Instead, petitioner has been put in a catch-twenty two position by having a witness, key to his defense, effectively denied the right to the protection of *Simmons,* that the circumstances of her position at the time of the search, clearly entitled her to.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

The writ of certiorari should be granted to afford this Court opportunity to define the exigent circumstances that will justify a warrantless entry into a home to make an arrest of a guest and to fix the boundaries of such permissible limitation. It is submitted that none but the most emergency of circumstances should be permitted for a war-

rantless arrest of a guest to be executed in a person's home. And it is further submitted that once such arrest has been made, the officers should be required to promptly remove their prisoner, without any further intrusion, to minimize the extraordinary privacy invasion.

This Court should also limit reliance upon consent to those circumstances, where no prior exploration was made without reliance upon consent, that turned up incriminating evidence. Finally, a hearing court should be required to give a witness, in the precarious position of a potential defendant, notice that his hearing testimony cannot be used against him.

CONCLUSION

THE WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE GRANTED.

Respectfully Submitted,

ALBERT A. GAUDELLI
Attorney for Petitioner

ORDER DATED JULY 29, 1981

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and eighty-one.

81-1052

Filed July 29, 1981

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO, HECTOR TORRES, a/k/a Picaro, a/k/a Pic, a/k/a Woody, a/k/a Shvartza, LUIS ACOSTA, a/k/a Louis Molina, a/k/a Angel,

Defendants

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPO-PIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO,

Defendants-Appellants

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Anthony Todisco, Salvatore Sferrazza, Alphonse Zambuto, David D'Angelo, and Anthony Vallone,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/A. Daniel Fusaro
A. Daniel Fusaro, Clerk

by Francis X. Gendhart, Chief Deputy Clerk

DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1380-1, 1385-6, 1391-2, 1395-September Term, 1980
(Argued May 20, 1981 Decided May 22, 1981)
Docket Nos. 81-1052-1058

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY TODISCO, ANTHONY VALLONE, JOHN CAMPOPIANO, SALVATORE SFERRAZZA, ALFONSE ZAMBUTO, LEONARD BARRACANO, and DAVID D'ANGELO,

Defendants-Appellants.

Before:

MOORE, TIMBERS and MESKILL,
Circuit Judges.

Appeals from judgments of conviction entered in the Southern District of New York, Robert J. Ward, *District Judge,* of violations of the federal narcotics laws.

Affirmed.

BARRY IVAN SLOTNICK, New York, N.Y.
(Jay L. T. Breakstone, New York, N.Y., on the brief), *for appellant Todisco.*

MICHAEL YOUNG, New York, N.Y.
(Goldberger, Feldman, Dubin & Young, New York, N.Y., on the brief), *for appellant Vallone.*

JULIA HEIT, New York, N.Y.
(Edward Panzer, New York, N.Y., on the brief), *for appellant Barracano.*

MICHAEL L. SANTANGELO, New York, N.Y., *for appellant Campopiano.*

ANTHONY V. LOMBARDINO, Kew Gardens, N.Y., *for appellant Sferrazza.*

ALBERT A. GAUDELLI, Flushing, N.Y., *for appellant Zambuto.*

STEVEN B. DUKE, New Haven, Conn., *for appellant D'Angelo.*

RICHARD A. MARTIN, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., Lawrence F. Ruggiero, Mark F. Pomerantz and Mary Jo White, Asst. U.S. Attys., New York, N.Y., on the brief), *for appellee.*

PER CURIAM:

Appellants were convicted on various counts of a fifteen count indictment which charged them with conspiracy, and the distribution, possession and possession with intent to distribute heroin, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. §2 (1976).

All appellants except D'Angelo pled guilty following the denial of their motions to suppress certain evidence, but preserved their right to appeal from the denial of their pretrial motions. D'Angelo was convicted following a jury trial. From the judgments of conviction[1] entered on February 4, 1981, Robert J. Ward, *District Judge*, all appellants have appealed. For the reasons below, we affirm the convictions of all appellants on all counts.

The indictment followed a four month investigation by 65 agents of the Drug Enforcement Administration (DEA). The investigation concluded on September 3, 1980, at which time a $900,000, 3 kilogram, heroin sale was slated to take place in several installments. The sale had been negotiated between undercover DEA agents and appellants and their associates. To the extent relevant to the issues on appeal, the details of that investigation will be set forth below. For convenience, we shall rule upon the issues raised on appeal by referring to the events before, on and after September 3, 1980.

1. Events Before September 3 , 1980

We hold that no search warrant was required for the installation of two "pen registers" on appellant Todisco's telephones. *Smith v. Maryland*, 442 U.S. 735 (1979). We are not persuaded by appellant's effort to distinguish the *Smith* case on the ground that the pen register there was installed with the assistance of the telephone company. First, the Court in *Smith* held that the telephone company was acting as an agent of the police for Fourth Amendment purposes. *Id.* at 739, n.4. Moreover, the Court's reasoning—that the installation of a pen register is not a Fourth

1. Appellants were sentenced as follows: Todisco—Five concurrent 30 year terms; 10 years special parole. Vallone—Two concurrent 20 year terms; 10 years special parole. Barracano—Up to 10 years under the Young Adult Offender Act. Zambuto—Two concurrent 7 year terms; 3 years special parole. Sferrazza—Two concurrent 10 year terms; 3 years special parole. Campopiano—15 years. D'Angelo—Three concurrent 10 year terms; 3 years special parole.

Amendment search—applies with equal force to this case. In any event, appellants did not move for the suppression of the evidence obtained from the pen register and have not attempted to justify their delay. Their claim, even if it were meritorious, has been waived. *United States v. Rollins*, 522 F.2d 160, 165 (2 Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

There was ample probable cause to support the wiretaps on Todisco's telephone. They were authorized by Chief Judge Weinstein in the Eastern District of New York on August 7, 1980, and were extended by Judge Nickerson of the same court on August 26, 1980. Aside from the deference properly accorded to the determination by the issuing judge that there was probable cause, *United States v. Perry*, No. 79-1047, slip op. 6749, 6772 (2 Cir. Feb. 9, 1981), we hold, viewing the supporting affidavits as a whole and in a practical and common sense manner, *United States v. Steinberg*, 525 F.2d 1126, 1130 (2 Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), and in light of the ongoing investigation, that there was probable cause. Todisco, a known narcotics dealer, had numerous contacts with individuals who were selling large quantities of heroin to undercover DEA agents. The pen register had disclosed numerous calls to other known narcotics dealers. Todisco also was seen publicly with known dealers. While these contacts, as appellants suggest, are subject to an innocent interpretation when viewed in isolation, in view of the ongoing investigation and the close proximity in time between many of the contacts and the known sales, we hold that there was probable cause to believe that Todisco was involved.

We also hold that the affidavits adequately alleged that normal investigative procedures had been or would be ineffective. The affidavits did disclose the standard investigativie techniques which had been employed and the paucity of evidence which had resulted, or could be ex-

pected to result, therefrom. *United States v. Vasquez*, 605 F.2d 1269, 1282 (2 Cir.), *cert. denied*, 444 U.S. 981 (1979). Appellants' observation that the language employed in the affidavit in this regard resembled that used in another case is irrelevant, especially since there is no claim that the assertions are untrue or do not apply to the facts herein.

We also hold that the application was properly authorized. Order No. 799-78 clearly was adequate to empower the Assistant Attorney General of the Criminal Division, Philip Heymann, to authorize the application. *In re Weir*, 520 F.2d 662, 667 (9 Cir. 1975). There is no question here, as there was in *United States v. Giordano*, 461 U.S. 505 (1974) (relied upon by appellants), that the Assistant Attorney General did not actually sign the memorandum approving the application. There is no requirement that the authorizing official must recite his reasons for approving a recommended wiretap application. We decline appellants' invitation to hold that the district court erred in refusing to hold a full evidentiary hearing based on appellants' unfounded speculation.

Finally, with respect to the events before September 8, 1980, we hold that the district court's finding of fact that the "August 8, 1980" date on the order authorizing the wiretaps was a ministerial error and therefore insignificant, was not clearly erroneous.

2. Events on September 3 , 1980

We hold that the warrantless arrest of Todisco in Apartment 3C at 610 Waring Avenue was lawful. There can be no doubt that, under the precedents in this Circuit, the district court did not err in refusing to suppress the "fruits" of that arrest, including the evidence uncovered in the subsequent search of the apartment. *United States v. Campbell*, 581 F.2d 22, 26 (2 Cir. 1979); *United States v.*

Reed, 572 F.2d 412, 424 (2 Cir. 1978), *Cert. denied*, 439 F.2d 913 (1978). Todisco was known to be engaged in a serious crime at the time of his arrest. One of his cohorts had just been arrested with a gun. And, most compellingly, Todisco was in a position to destroy substantial evidence of his guilt. Appellants' assertions that the DEA agents somehow "manufactured" these events are belied by the facts. The agents had no way of knowing, before the events occurred, that Todisco, at the time of the arrests, would be secreted with a large quantity of heroin waiting for co-appellant Vallone to return. While an arrest warrant could have been obtained before September 3, we decline, on the fact of this case, to interfere with the discretion accorded narcotics agents to determine when they will make an arrest. *See United States v. Santiago*, 327 F.2d 573 (2 Cir. 1964). That is especially so here, where there simply is no basis for the claims of appellants.

Since the arrest of Todisco, and the entry subsequent to his arrest, were lawful, there is no question that the search of Apartment 3C, pursuant to a warrant issued on September 3, 1980, also was lawful.

Appellants' claims regarding the warrantless arrest of appellant Sferrazza, and the search of the Zambuto residence subsequent to that arrest, also are without merit. Based on the wiretap evidence, and the DEA agents' observations of the meeting between Sferrazza and Todisco on the morning of the September 3 heroin sale, the agents clearly had probable cause to arrest Sferrazza. In the district court Sferrazza unequivocally withdrew his claim that the warrantless arrest in the Zambuto residence somehow violated his Fourth Amendment rights. He also withdrew his claim that evidence seized subsequent to that arrest, and his confession to DEA agents, should be suppressed for that reason.

In view of the claims of other appellants regarding the Sferrazza arrest, however, we hold that, even assuming that a warrant was required to arrest Sferrazza in Zambuto's home absent exigent circumstances, *Steagold v. United States*, 49 U.S.L.W. 4418 (U.S. April 21, 1981), the arrest here nevertheless was proper. In that regard, we hold that Judge Ward's findings of fact, stated on the record on December 4, 1980, that exigent circumstances justifying the warrantless arrest clearly existed under the standards set forth in *United States v. Reed, supra*, were not clearly erroneous.

We hold that the evidence seized in the Zambuto home following the Sferrazza arrest was admissible. Mrs. Zambuto's affirmative assistance in the discovery of $300,000 in cash hidden in the Zambuto basement is compelling evidence that she voluntarily consented to the search, *United States v. Rothberg*, 460 F.2d 223 (2 Cir. 1973). The money therefore was admissible. The district court found that Mrs. Zambuto's testimony that she was coerced by the DEA agents to assist in their search was "unbelievable." This finding was based in part on her demeanor and her unresponsive answers to questions on cross-examination. The district court challenged "any who read the record [to] find otherwise." Having carefully read the record, and according deference to the district court's determination of witness credibility, *Alessi v. United States*, 628 F.2d 1133, 1135 (2 Cir. 1980), we hold that the district court's admission of this evidence was proper.

Similarly, we hold that Sferrazza knowingly and intelligently waived his *Miranda* rights before making incriminating statements to the DEA agents. Based on Sferrazza's in-court behavior and the recorded telephone conversations involving him, the district court had an ample basis for discounting appellant's claim that he did not understand English.

We further hold that the execution of the search warrant covering the Zambuto home on the evening of September 3 did not violate anyone's rights under the Fourth Amendment. The district court's finding of fact that the search began before 10 P.M. was not clearly erroneous, in the light of testimony that the agents were notified by telephone that the warrant had been approved by Magistrate Chrein at 9:50 P.M.

The search of Todisco's home, pursuant to a warrant issued on September 3, also was lawful. There is no inconsistency between the September 3 application for that warrant and the DEA agents' earlier application for a wiretap order for Todisco's telephone. There was no evidence, prior to Todisco's arrest on September 3, that he ever physically possessed heroin. There is no merit in appellants' claim that the agents were required to discuss with the magistrate on September 3 the contents of the earlier, irrelevant, application for a wiretap.

3 . Events After September 3

We hold that the district court did not abuse its discretion in refusing to grant a continuance after the filing of a superseding indictment on November 25, 1980. First, the Speedy Trial Act, 18 U.S.C. §3161(c)(1980 Supp.), does not divest the district court of its discretion to grant or refuse a continuance. The district court's inquiry and ruling on the motion for a continuance was consistent with the guidelines promulgated by this Circuit under the Speedy Trial Act. Guidelines Under the Speedy Trial Act, II L, comment, at 31 (January 16, 1979). While those guidelines do not have the force of law, they are entitled to appropriate respect. Appellants' arguments do not convince us that those guidelines are incorrect or inconsistent with the statute, or that 18 U.S.C. §3161(c) stripped the district court of its discretion under the circumstances of this case.

In view of the fact that the charges in the superseding indictment were substantially the same as those in the original indictment and in view of the fact that substantial discovery had taken place, we hold that the district court did not abuse its discretion in refusing to grant a continuance.

Similarly, the district court did not abuse its discretion in refusing to grant D'Angelo a continuance on the eve of trial to obtain new counsel. The court gave D'Angelo an ample and continuing opportunity to air his complaints about counsel. These amounted to no more than a disagreement about tactics and an unspecified "loss of confidence." The court had ample opportunity to observe counsel and to note his competence during the months before trial when the same counsel represented D'Angelo, without incident. In addition, the court did its utmost to accommodate D'Angelo's concerns without disrupting the scheduling of this complex jury trial. We repeatedly have expressed our concern that district courts be wary of eleventh hour requests for new counsel. *E.g., United States v. Carroll,* 510 F.2d 507, 510 (2 Cir. 1975); *United States v. Llanes,* 374 F.2d 712, 717 (2 Cir. 1967). Under the circumstances of this case, we hold that the district court's refusal to grant a continuance was a proper exercise of his discretion.

We also hold that D'Angelo's representation at trial was by no means constitutionally ineffective under this Circuit's standard. *E.g., United States v. Bubar,* 567 F.2d 192, 202 (2 Cir. 1977), *cert. denied,* 434 U.S. 872 (1977). We find no merit in the claim that the district court deprived D'Angelo of a fair trial by failing to exclude evidence which appellant's counsel made a conscious, tactical, decision to present.

We further hold that there was sufficient evidence to support the jury verdict convicting D'Angelo. First, the court did not err in admitting the hearsay statements of

D'Angelo's co-conspirators. There was ample independent evidence of D'Angelo's participation in the conspiracy to permit the admission of these statements. *United States v. Geaney*, 417 F.2d 1117 (2 Cir. 1969). The court and jury were free to reject D'Angelo's "innocent" interpretation of the telephone calls and clandestine meetings which D'Angelo had with Todisco and his associates. *United States v. Weisman*, 624 F.2d 1118, 1130 (2 Cir. 1980), *cert. denied*, ___U.S.___ (1981). In asking us to accept his innocent gloss on the evidence before the district court, D'Angelo in effect is asking us to view those events in isolation and to disregard the fact that they occurred during substantial heroin sales to undercover agents. We hold that there was sufficient evidence upon which the jury could find D'Angelo guilty beyond a reasonable doubt.

Finally, we hold that Todisco's claim that his guilty plea was not knowingly and intelligently made is frivolous. Todisco, represented by counsel, engaged in a colloquy with the district court which more than adequately demonstrated that he understood the nature of the charges to which he pled guilty.

All appellants were convicted of serious offenses on the basis of overwhelming evidence of guilt—six by pleading guilty and one after a jury trial. Our careful examination of the record satisfies us that all appellants wre accorded a fair hearing, by a conscientious district judge, on their pretrial motions and, in the case of one appellant, at his jury trial. We affirm the convictions of all appellants on all counts. We order that the mandate issue forthwith.

Affirmed.

INDICTMENT

S 80 Cr. 563 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, a/k/a "Grandpa," ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," DAVID D'ANGELO, HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Schvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie,"

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about April 1, 1980, continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, the defendants, ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, a/k/a "Grandpa," ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE,

a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," DAVID D'ANGELO, HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Schvartza" and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, combined, conspired, confederated and agreed, together and with each other, to violate the narcotics laws of the United States, specifically, Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE OBJECTS OF THE CONSPIRACY

2. It was part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully, intentionally and knowingly, would and did distribute and possess with intent to distribute massive amounts of heroin, a Schedule I narcotic drug controlled substance, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE MEANS USED BY THE DEFENDANTS AND THEIR CO-CONSPIRATORS TO FURTHER THE OBJECTS OF THE CONSPIRACY

3. Among the means whereby the defendants and their co-conspirators would and did carry out the objects of the conspiracy and insure the success of their venture to receive and distribute narcotic drugs for profit were the following:

The conspiracy took the form of a loosely-knit business organization with members performing different functions and operating at different levels of responsibility.

(i) The head of the organization was defendant ANTHONY TODISCO, who organized supervised and manag-

ed the narcotics supply and distribution, and related activities of his narcotics organization.

(ii) Certain members of the conspiracy, including ANTHONY VALLONE, HECTOR TORRES and LUIS ACOSTA, participated in the distribution of narcotic drugs to the customers of TODISCO's organization, by negotiating for the sale of narcotics, by transporting narcotics before and during narcotics transactions, and by receiving and delivering the cash proceeds of narcotics sales.

(iii) Others members of the conspiracy, including DAVID D'ANGELO, JOHN CAMPOPIANO, LEONARD BARRACANO, SALVATORE SFERRAZZA and ALPHONSE ZAMBUTO, participated in the distribution of narcotic drugs to the customers of TODISCO's organization, by storing and/or transporting narcotics for TODISCO's organization or aiding the storing and/or transporting of narcotics for TODISCO's organization, and participated in the receipt and dissemination of the proceeds obtained from the distribution of the narcotics.

OVERT ACTS

In pursuance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about May 14, 1980, in the vicinity of Westchester and Boynton Avenues, Bronx, New York, defendants HECTOR TORRES and LUIS ACOSTA sold approximately 27.90 grams, net weight, of heroin to a Special Agent of the United States Drug Enforcement Administration acting in an undercover capacity (hereinafter "an undercover agent"), for approximately $9,500.

2. On or about May 14, 1980, in the vicinity of 1226 Boynton Avenue, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES met with defendant ANTHONY VALLONE.

3. On or about May 14, 1980 the defendant ANTHONY VALLONE drove to and entered the premises at 149-54 21st Avenue, Queens, New York, a two-family residence partly owned by the defendant ANTHONY TODISCO.

4. On or about May 27, 1980, in the vicinity of 1226 Boynton Avenue, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES sold a total of approximately 117.08 grams, net weight, of heroin to an undercover agent for approximately $38,500.

5. On or about May 27, 1980, in the vicinity of 1226 Boynton Avenue, Bronx, New York, defendant ANTHONY VALLONE placed a bag in the trunk of an automobile.

6. On or about May 27, 1980, defendant ANTHONY VALLONE drove to the vicinity of 149-54 21st Avenue, Queens, New York.

7. On June 26, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES sold approximately 117.64 grams, net weight, of heroin to an undercover agent for approximately $40,000.

8. On or about June 26, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, defendant ANTHONY VALLONE met defendant HECTOR TORRES.

9. On June 26, 1980, the defendant LUIS ACOSTA had telephone conversations with an undercover agent.

10. On or about August 1, 1980, defendant DAVID D'ANGELO met defendants ANTHONY TODISCO and ANTHONY VALLONE in a parking lot in the vicinity of 149th Street and the Cross Island Parkway, Queens, New York.

11. On or about August 1, 1980, at approximately 4:50 p.m., defendant DAVID D'ANGELO met defendant ANTHONY VALLONE in a parking lot in the vicinity of 149th Street and the Cross Island Parkway, Queens, New York.

12. On or about August 1, 1980, defendant ANTHONY VALLONE left a parking lot in the vicinity of 149th Street and the Cross Island Parkway, Queens, New York, and drove to the Bronx, New York.

13. On or about August 1, 1980, at approximately 6:10 p.m., in the vicinityof 30 East Kingsbridge Road, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES sold approximately 118.85 grams, net weight, of heroin to an undercover agent for approximately $43,500.

14. On or about August 1, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, defendant ANTHONY VALLONE met defendant HECTOR TORRES.

15. On or about August 1, 1980, defendant ANTHONY VALLONE drove to and entered the premises at 149-54 21st Avenue, Queens, New York.

16. On or about August 12, 1980, defendant LUIS ACOSTA had a telephone conversation with an undercover agent.

17. On or about August 12, 1980, the defendants ANTHONY TODISCO and DAVID D'ANGELO had a telephone conversation during which ANTHONY TODISCO arranged to meet DAVID D'ANGELO.

18. On or about August 12, 1980, defendant DAVID D'ANGELO brought a package to an automobile occupied by ANTHONY TODISCO in a parking lot in the vicinity of 149th Street and the Cross Island Parkway, Queens, New York.

19. On or about August 12, 1980, the defendants ANTHONY TODISCO and ANTHONY VALLONE had a telephone conversation.

20. On or about August 14, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES sold approximately 118.71 grams, net weight, of heroin to an undercover agent for approximately $43,500.

21. On or about August 14, 1980, defendant ANTHONY VALLONE met defendant HECTOR TORRES in the vicinityo f 30 East Kingsbridge Road, Bronx, New York.

22. On or about August 14, 1980 the defendant ANTHONY VALLONE drove to and entered the premises at 149-54 21st Avenue, Queens, New York.

23. On or about August 15, 1980, the defendant ANTHONY TODISCO had a telephone conversation with the defendant LEONARD BARRACANO during which ANTHONY TODISCO arranged to meet LEONARD BARRACANO later that day.

24. On or about August 15, 1980, the defendant ANTHONY TODISCO left the premises at 665 Thwaites Place, Bronx, New York and entered the premises at 610 Waring Avenue, Bronx, New York.

25. On or about August 17, 1980, the defendants LEONARD BARRACANO and ANTHONY TODISCO had a telephone conversation.

26. On or about August 17, 1980, the defendant JOHN CAMPOPIANO had a telephone conversation with a woman.

27. On or about August 17, 1980, the defendants SALVATORE SFERRAZZA, ANTHONY TODISCO and JOHN CAMPOPIANO had a telephone conversation during which SALVATORE SFERRAZZA arranged to go to ANTHONY TODISCO's house.

28. On or about August 26, 1980, the defendants ANTHONY TODISCO and JOHN CAMPOPIANO had a telephone conversation during which they discussed JOHN CAMPOPIANO's having met with "Grandpa."

29. On or about August 26, 1980 the defendant ANTHONY TODISCO and SALVATORE SFERRAZZA had a telephone conversation.

30. On or about August 28, 1980, the defendants ANTHONY TODISCO and LEONARD BARRACANO had a telephone conversation during which ANTHONY TODISCO arranged to meet LEONARD BARRACANO later that day.

31. On or about August 28, 1980, the defendants ANTHONY TODISCO and LEONARD BARRACANO and another entered the building at 610 Waring Avenue, Bronx, New York.

32. On or about September 1, 1980, the defendant ANTHONY VALLONE called HECTOR TORRES from ANTHONY TODISCO's telephone.

33. On or about September 2, 1980, the defendants SALVATORE SFERRAZZA and ANTHONY TODISCO had a telephone conversation during which they arranged to meet the next day.

34. On or about September 2, 1980, the defendants ANTHONY TODISCO and ANTHONY VALLONE had a telephone conversation during which they discussed going to work at 10 o'clock the following morning " . . . on that three loads."

35. On or about September 2, 1980, the defendants ANTHONY TODISCO and ANTHONY VALLONE had a telephone conversation during which ANTHONY TODISCO told ANTHONY VALLONE he went to see SALVATORE SFERRAZZA.

36. On or about September 3, 1980, the defendant ANTHONY VALLONE called the defendant HECTOR TORRES from the defendant ANTHONY TODISCO's telephone and arranged to speak to HECTOR TORRES again at 10:00 a.m.

37. On or about September 3, 1980, in the vicinity of 30 East Kingsbridge Road, Bronx, New York, defendants LUIS ACOSTA and HECTOR TORRES distributed approximately 477.04 grams, net weight, of heroin to an undercover agent for approximately $137,500 in cash.

38. On or about September 3, 1980, in the Bronx, New York, defendant ANTHONY VALLONE possessed approximately 950.38 grams, net weight, of heroin.

39. On or about September 3, 1980, in Apartment 3C of 610 Waring Avenue, Bronx, New York, defendants ANTHONY TODISCO, ANTHONY VALLONE and LEONARD BARRACANO possessed quantities of heroin totaling approximately 2227.32 grams, net weight, of heroin and drug paraphernalia.

40. On or about September 3, 1980, at 21-02 21st Road, Astoria, New York, defendants ALPHONSE ZAMBUTO and SAL SFERRAZZA possessed quantities of heroin totaling approximately 375.67 grams, net weight, drug paraphernalia and approximately $393,750 in cash.

41. On or about September 3, 1980, at his residence at 149-54 21st Avenue, Queens, New York, the defendant ANTHONY TODISCO possessed approximately 2.31 grams, net weight, of heroin and drug paraphernalia.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

From on or about April 1, 1980, and continuously thereafter up to and including the date of the filing of this indictment, in the Sothern District of New York and elsewhere, ANTHONY TODISCO, the defendant, unlawfully, wilfully, intentionally and knowingly, did engage in a continuing criminal enterprise in that he did commit violations of Title 21, United States Code, Sections

812, 841(a)(1) and 841(b)(1)(A) as alleged in Counts Five through Fifteen of this indictment, which are incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by TODISCO in concert with at least five other persons with respect to whom TODISCO occupied the position of organizer, supervisor and manager and from which continuing series of violations TODISCO obtained substantial income and resources.

(Title 21, United States Code, Section 848.)

COUNT THREE

The Grand Jury further charges:

On or about the 29th day of April, 1980, in the Southern District of New York, LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 1.22 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

COUNT FOUR

The Grand Jury further charges:

On or about the 13th day of May, 1980, in the Southern District of New York, LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately .2 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

CONT FIVE

The Grand Jury further charges:

On or about the 14th day of May, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 27.9 grams, net weight, of heroin and diluents.

(Title 21, United Sttes Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Sectior. 2.)

COUNT SIX

The Grand Jury further charges:

On or about the 27th day of May, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 117.08 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SEVEN

The Grand Jury further charges:

On or about the 11th day of June, 1980 in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, 1.38 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT EIGHT

The Grand Jury further charges:

On or about the 26th day of June, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 117.64 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT NINE

The Grand Jury further charges:

On or about the 1st day of August, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," DAVID D'ANGELO, HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LOUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 118.85 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TEN

The Grand Jury further charges:

On or about the 14th day of August, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," ANTHONY VALLONE, a/k/a "Tutti," DAVID D'ANGELO, HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 118.71 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT ELEVEN

The Grand Jury further charges:

On or about the 3rd day of September, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 477.04 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

On or about the 3rd day of September, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 950.38 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT THIRTEEN

The Grand Jury further charges:

On or about the 3rd day of September, 1980, in the Southern District of New York, ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 2227.32 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOURTEEN

The Grand Jury further charges:

On or about the 3rd day of September, 1980 in the Eastern District of New York, ANTHONY TODISCO, a/k/a "lefty," SALVATORE SFERRAZZA, ALPHONSES ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance,

to wit, approximately 375.67 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FIFTEEN

The Grand Jury further charges:

On or about the 3rd day of September, 1980 in the Eastern District of New York, ANTHONY TODISCO, a/k/a "Lefty," SALVATORE SFERRAZZA, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a "Uncle John," a/k/a "Echoes," ANTHONY VALLONE, a/k/a "Tutti," LEONARD BARRACANO, a/k/a "The Kid," HECTOR TORRES, a/k/a "Picaro," a/k/a "Pic," a/k/a "Woody," a/k/a "Shvartza," and LUIS ACOSTA, a/k/a "Louis Molina," a/k/a "Angel," a/k/a "Angie," the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 2.31 grams, net weight, of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

FOREMAN

JOHN S. MARTIN, JR.
United States Attorney

Opposition

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS

No. 81-551

In the Supreme Court of the United States

OCTOBER TERM, 1981

ALPHONSE ZAMBUTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether exigent circumstances justified a warrantless entry by DEA agents into petitioner's house to arrest one of his co-defendants.

2. Whether petitioner's wife voluntarily consented to the agents' seizure of two bags from the basement of petitioner's house.

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ALPHONSE ZAMBUTO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on July 29, 1981 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon his plea of guilty in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and possession of heroin with

intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to concurrent terms of seven years' imprisonment to be followed by a three year special parole term. The court of appeals affirmed (Pet. App. 3a-12a).

1. The evidence at co-defendant D'Angelo's trial showed that petitioner was a member of a large-scale organization that sold large amounts of nearly pure heroin to other drug dealers in the New York City area. Co-defendant Anthony Todisco headed the organization. Other co-defendants served the organization in different ways: Anthony Vallone and Leonard Barracano were Todisco's lieutenants, whose primary duty was to deliver and store heroin; Luis Acosta and Hector Jones functioned as sellers and promoters; D'Angelo and Salvatore Sferrazza were the organization's chief suppliers; and John Campopiano helped plan sales. Petitioner's function was to store at his house the heroin supplied to the organization by Sferrazza.

From May 14 to September 3, 1980, DEA Special Agent William Silvestri made six separate purchases of heroin from the Todisco organization (Tr. 574-582, 617-622, 681-691, 769-772, 1035-1038, 1170-1175).[2] Todisco, Vallone, Torres, and Acosta were arrested on September 3 after Agent Silvestri purchased half a kilogram of heroin for $137,500 from Torres as part of a three-kilogram transaction scheduled for that day (Tr. 1170-1175). A short time later, Sferrazza was arrested at petitioner's house, where nearly $300,000—including the $137,500 paid to Torres by Agent Silvestri—and a half kilogram of heroin were found.

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[1] Petitioner and seven of his co-defendants pleaded guilty prior to trial on the condition that they could appeal the denial of certain pretrial motions. The one remaining co-defendant, David D'Angelo, was convicted following a jury trial.

[2] "Tr." refers to the trial transcript.

2. Petitioner moved to suppress the heroin and money found in his house. The evidence adduced at the suppression hearing (H. Tr. 508-513)[3] showed that at about 11:30 a.m. on September 3, 1980, Todisco entered petitioner's house carrying a paper bag that he had taken with him from 610 Waring Avenue in the Bronx, where Vallone had appeared a short time earlier with the proceeds of the heroin sale to Agent Silvestri. Todisco thereafter departed petitioner's house carrying a different bag and returned to 610 Waring Avenue, where he was arrested. Sferrazza emerged from petitioner's house shortly after Todisco. The surveilling agents tried to follow Sferrazza, but lost him in traffic a few blocks away.

At about 12:05 p.m., after the arrest of Todisco, Vallone, Torres and Acosta, Sferrazza returned to petitioner's house. Although the agents attempted to reach him before he entered the house, they were unable to do so. They decided against rushing up to seize him before his entry, because they feared that two teenagers sitting on the front steps of the house would alert the persons inside. Instead, the agents immediately followed Sferrazza into the house and placed him under arrest. They then conducted a cursory security sweep of the house, in the course of which they observed thousands of baggies, several scales, white powder residue, and about an ounce of heroin in the basement.

Following the discovery in the basement, Special Agent Fred Sandler told Sferrazza that the agents were applying for a warrant to search the Zambuto house, and the agent asked Sferrazza to cooperate in helping the agents locate the cash that Agent Silvestri had paid for the heroin earlier that day. Sferrazza replied that he would take the agents to the money, which was downstairs. After going down to the

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[3] "H. Tr." refers to the transcript of the suppression hearing.

basement with another agent, Sferrazza returned and told Agent Sandler that he could not find the money. However, he added that Mrs. Zambuto, petitioner's wife, had helped him bring the money downstairs and knew exactly where it was. At Sferrazza's request, Mrs. Zambuto then led the agents to two bags in the basement. Together, the bags contained over $293,000 in cash, including the same bills that Agent Silvestri had exchanged for the heroin. In addition, when the basement was thoroughly searched pursuant to a search warrant issued later that day, the agents found approximately 340 grams of pure heroin behind a sheet rock wall.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the evidence found in his house should have been suppressed because his Fourth Amendment rights were violated by the agents' warrantless entry into his house to arrest co-defendant Sferrazza. Petitioner concedes (Pet. 7) that the agents had probable cause to arrest Sferrazza, but he challenges the district court's finding (H. Tr. 1172-1173) that the warrantless entry was justified by exigent circumstances.[4]

The district court found that the offense in question was a grave one, which often involves violence when agents attempt to make arrests (H. Tr. 1172). The court found that

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[4]We note that in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), this Court held that, absent exigent circumstances or consent, law enforcement agents must obtain a search warrant before they may enter a third party's residence to search for the subject of an arrest warrant. Although the agents' entry into Zambuto's house occurred prior to *Steagald*, this case does not present any question concerning the retroactivity of that decision. Because the agents were armed with neither a search warrant nor an arrest warrant, and because it was established at the time of the entry that, at the least, an arrest warrant was required to effect an arrest entry into private premises (*Payton* v. *New York*, 445 U.S. 573 (1980); *United States* v. *Reed*, 572 F. 2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978)), the validity of the entry in this case necessarily turns on the presence of exigent circumstances.

it was "reasonable to believe" that Sferrazza, as a person involved in the transfer of large amounts of narcotics and money, would be armed, and it further found that the agents had probable cause to believe that Sferrazza had committed a narcotics crime (H. Tr. 1172-1173). Finally, the court found that the agents entered peacefully through an unlocked door, and concluded that "it was appropriate to act promptly to apprehend [Sferrazza] since he might well have sought to escape arrest" (H. Tr. 1173). In affirming the district court's denial of petitioner's suppression motion, the court of appeals concluded (Pet. App. 9a) that the district court's findings with respect to the exigent nature of the circumstances confronting the agents were not clearly erroneous.

There is no occasion for further review of the decisions below. The evidence at the suppression hearing demonstrated that the agents faced the risk that if they were to delay Sferrazza's arrest, he might receive word of the arrests of his co-conspirators and attempt either to flee or to resist arrest by force of arms. In addition, the agents had reasonable cause to believe that heroin and money were concealed in petitioner's house, in view of the presence of Todisco and Sferrazza in the house earlier that day under circumstances suggesting that Todisco had given Sferrazza the proceeds of the sale to Agent Silvestri and that Sferrazza had given heroin to Todisco.[5] Accordingly, any delay in arresting Sferrazza could have resulted in the destruction of important evidence. On this record—and in light of the agents'

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[5]Todisco arrived at petitioner's house carrying the same bag that he had taken with him from 610 Waring Avenue, where Vallone had appeared with the money. Todisco left petitioner's house carrying a different bag and took the bag back to 610 Waring, whence Vallone had twice departed with the batches of heroin to be sold that day (Tr. 1170-1176). Based on the intercepted conversations, Sferrazza was known to be the source of the heroin.

immediate pursuit of Sferrazza into the house (see *United States* v. *Santana*, 427 U.S. 38 (1976); *Warden* v. *Hayden*, 387 U.S. 294 (1967))—the court of appeals correctly held that the district court's finding of exigent circumstances was not clearly erroneous.[6]

2. Petitioner further contends (Pet. 9-11) that his Fourth Amendment rights were violated when the agents seized the two bags containing $293,000 in cash. Specifically, he disputes the court of appeals' conclusion (Pet. App. 9a) that his wife voluntarily led the agents to the bags.

a. Petitioner first argues that the agents' initial entry into the basement in the course of their security sweep—which revealed a quantity of heroin and various narcotics paraphernalia in plain view—was illegal, and that this discovery "acted as a coercive device to induce [his wife] to curry favor, lest she be arrested * * *" (Pet. 10). We note at the outset, however, that petitioner did not raise this argument on appeal. Despite the fact that the government specifically pointed out in its brief in the court of appeals that petitioner did not raise any claim concerning the legality of the agents' security check of the house (Gov't C.A. Br. 36 n.*), petitioner did not file a reply brief or otherwise address this issue in the court below. In these circumstances, petitioner should be foreclosed from raising the issue in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

Furthermore, petitioner's argument that his wife's consent was tainted by the protective sweep is flawed. The record clearly establishes that Mrs. Zambuto went to the

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[6]Given the agents' attempt to reach Sferrazza outside the house (H. Tr. 517, 530-531, 584-585, 591-592, 638-639), petitioner's claim (Pet. 8) that they deliberately arrested Sferrazza inside as a pretext for conducting a search is without merit. Indeed, the district court explicitly rejected this contention (H. Tr. 1171).

basement and retrieved the bags not at the instance of the agents, but at the request of co-defendant Sferrazza, who cooperated with the agents after his arrest apparently in the hope that he would be treated more favorably. Thus, Mrs. Zambuto's consent was the result of Sferrazza's request and not the fruit of the agents' protective sweep. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Elkins* v. *United States*, 364 U.S. 206, 223 (1960).

Finally, we note that petitioner does not contend that the decision below is in conflict with the decision of any other court of appeals. Rather, petitioner merely contends (Pet. 10) that the circumstances in this particular case were not sufficiently exigent to justify the agents' protective sweep. This fact-bound contention does not warrant this Court's review. The courts of appeals have recognized that when law enforcement officers arrest a person inside a residence they may conduct a brief, cursory inspection of the premises when they reasonably believe that other persons might be present who could pose a danger to them. See, *e.g.*, *United States* v. *Gardner*, 627 F. 2d 906, 909-910 (9th Cir. 1980); *United States* v. *Dien*, 609 F. 2d 1038, 1047 (2d Cir. 1979), adhered to on rehearing, 615 F. 2d 10 (1980); *United States* v. *Cravero*, 545 F. 2d 406, 417-418 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Rich*, 518 F. 2d 980, 985-986 (8th Cir. 1975).[7] Here, once the agents had lawfully entered petitioner's house to arrest Sferrazza, a

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[7]In *United States* v. *Gamble*, 473 F. 2d 1274 (7th Cir. 1973), the court suppressed evidence discovered during a protective sweep of a residence. The court noted, however, that the government did not contend that the cursory search was justified by fears that other dangerous persons were present on the premises (*id.* at 1277), and Judge Fairchild noted in his concurring opinion that in a case where there was a reasonable basis for concern that other persons might be present and pose a danger to the officers, a limited protective search by the officers would be permissible (*id.* at 1278).

limited protective sweep of petitioner's residence was justified because of the violence-prone nature of the narcotics business (see page 4-5, *supra*), coupled with the fact that numerous persons participated in the heroin distribution scheme and several of the participants were known to have frequented petitioner's house.

Petitioner's reliance (Pet. 9) on *Chimel* v. *California*, 395 U.S. 752 (1969), is misplaced. That case held that police executing an arrest may not undertake a full blown search of areas outside the immediate control of the arrestee. See *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 5. But *Chimel* does not address the authority of the police to conduct a quick security check of the premises inside of which an arrest has taken place when they reasonably fear themselves in danger.[8]

b. Next, petitioner argues that his wife's consent to the seizure was invalid because she was not warned of her right to refuse to cooperate. In the circumstances of this case, however, the agents were not required to inform Mrs. Zambuto of her Fourth Amendment rights, since she led them to the bags not at their request, but at the request of co-defendant Sferrazza. In any event, as this Court observed in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973), "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

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[8]Because this case involves a protective sweep conducted in the course of an arrest inside a house, it does not present any question concerning the propriety of security searches performed during an arrest *outside* a residence for the purpose of either protecting the officers (see, *e.g.*, *United States* v. *Baker*, 577 F. 2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Bowdach*, 561 F. 2d 1160, 1168-1169 (5th Cir. 1977)), or preventing the destruction of evidence. See, *e.g.*, *United States* v. *Vasquez*, 638 F. 2d 507, 531-532 (2d Cir. 1980), cert. denied, No. 80-1910 (Nov. 2, 1981).

Petitioner also challenges the validity of his wife's consent on the ground that "the agents, one dozen strong, entered [his] home with guns drawn and remained [there] an inordinate length of time" (Pet. 10-11). But petitioner neglects to mention that his wife retrieved the money shortly after the agents entered the house and arrested Sferrazza. Accordingly, the fact that the agents thereafter remained in the house for a lengthy period (securing the premises while a search warrant was obtained) could not have influenced her action. As to petitioner's emphasis on the number of agents with guns inside the house, there is no credible evidence suggesting any duress or coercion of Mrs. Zambuto by the agents that would have rendered her consent invalid.[9]

c. Finally, noting that at the suppression hearing his wife invoked the Fifth Amendment privilege on several occasions, petitioner argues that in order to encourage her to testify more freely, the district court should have informed Mrs. Zambuto that nothing she said could later be used against her. In the first place, however, Mrs. Zambuto did not have any immunity with respect to her testimony at the suppression hearing. *Simmons* v. *United States*, 390 U.S. 377 (1968), upon which petitioner mistakenly relies (Pet.

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[9]At the hearing, Mrs. Zambuto testified that she had not helped the agents find the money (H. Tr. 1111). She also testified that the agents hit one of her children with a gun and punched holes in the wall before a search warrant was obtained (H. Tr. 994-995, 997-998). Concerning her testimony, the district court stated (H. Tr. 1073-1074):

> [A]t this point I have reached the conclusion that I have got to throw it all out, everything that she said. I have observed her, I have watched her. I have observed inconsistencies in her testimony. I am just about prepared to disregard it entirely.

The court of appeals upheld the district court's finding that Mrs. Zambuto's testimony was " 'unbelievable' " (Pet. App. 9a).

11), confers a form of immunity only on defendants who wish to testify at a suppression hearing, not on other witnesses. Furthermore, petitioner fails to reveal that it was his attorney who was the moving force behind his wife's repeated assertions of the privilege against self-incrimination. Indeed, petitioner's attorney repeatedly urged the court not to compel Mrs. Zambuto to answer questions, "signalled" her to that effect, and later acknowledged having advised her not to answer the questions posed by the government on cross-examination (H. Tr. 1077-1079, 1148-1149).

In short, the record shows that Mrs. Zambuto voluntarily consented to the seizure of the bags by the DEA agents. But even in the absence of such consent, suppression of the money would not be required, since the bags inevitably would have been discovered when the agents later searched the house pursuant to a search warrant.[10] See *Brewer* v. *Williams*, 430 U.S. 387, 407 n.12 (1977); *United States* v. *Jarvis*, 560 F. 2d 494, 498-499 (2d Cir. 1977), cert. denied, 435 U.S. 934 (1978); *United States* v. *Seohnlein*, 423 F. 2d 1051, 1053 (4th Cir. 1970).

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[10]The record reflects that the decision to apply for a search warrant preceded the discovery of the money (H. Tr. 512), and there was of course ample probable cause for the search quite apart from that discovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

DOJ-1981-11